IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WALTER E. MAXTED, Appellant,	)	
vs.	)	NO. 22773
UNITED STATES OF AMERICA, Appellee.	)	

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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APPELLEE'S BRIEF

I

STATEMENTS OF THE PLEADINGS AND FACTS DISCLOSING JURISDICTION

On July 20, 1966, the Federal Grand Jury for the then Southern Division of the Southern District of California returned a seven-count indictment, Criminal Case No. 37002-SD, charging appellant in Counts One through Count Seven with violations of Title 21, United States Code, Section 176(a), knowingly selling and facilitating the transportation of illegally imported marijuana. Clerk's Transcript, pp. 2-8 (hereinafter referred to as C.T.)

On January 16, 1968, a trial by jury commenced in this matter on Counts One through Six. Id. at 52. On January 18, 1968, appellant was found guilty of Counts One, Two, Five, and Six, id. at 54, with Counts Three, Four and Seven dismissed on motion by appellee. Id. at 52.

On February 16, 1968, appellant was committed by the Honorable Fred Kunzel to the custody of the Attorney General for a period of seven (7) years concurrently on each count. Id. at 57. A timely Notice of Appeal was filed. Id. at 58.

The offenses occurred in the then Southern Division of the Southern District of California, and jurisdiction of the District Court was based on Title 21, United States Code, Section 176(a), and Title 18, United States Code, Section 3231. The jurisdiction of the United States Court of Appeals for the Ninth Circuit is based on Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES INVOLVED

Title 21, United States Code, Section 176(a), provides inter alia:

> "[W]hoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or

clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law . . . shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000."

III

STATEMENT OF THE CASE

A. Questions Presented

1. Did the lower Court err in allowing appellee on cross-examination to ask the appellant "Why were you acting as informant for the Federal Bureau of Narcotics?" when the appellant testified on direct that he had worked as an informant with that agency?

B. Statement of the Facts

On June 17, 1966, Larry Katz, an agent of the Federal Bureau of Narcotics, working in an undercover capacity, saw

appellant deliver the kilo of marijuana which Katz had ordered and purchased through co-defendant Warren Lee Wilson. Reporter's Transcript, pp. 14, 17 (hereinafter referred to as R.T.).

On July 11, 1966, Katz again ordered some marijuana from Wilson. As previously done, appellant delivered the marijuana. In addition to Katz, this delivery was also witnessed by Federal Bureau of Narcotics Agent Joe Baca, who had followed appellant to the drop area. Id. at 108-10. Appellee called Katz and Baca to testify to all the occurrences that took place. Nowhere, however, in appellee's case in chief against appellant, did appellee elicit any information about appellant's being an informer, or attempt to find out why the appellant had known Baca previously, or if Baca knew him to be working as an informer in order to "work off his beef." Id. at 12-152.

The testimony that appellant specifies as error does not begin to unfold until appellee's cross-examination of appellant's first witness, Chris Saiz, a Federal law enforcement agent. In order to place appellee's cross-examination in its proper perspective, it is first necessary to set forth the pertinent facts brought out on direct testimony by the appellant's questioning.

The following facts were elicited from Saiz on direct:

"Q: Now, Mr. Saiz, do you know my client, Mr. Walter Maxted?

A: Yes, sir, I do.

Q: Approximately how long have you known him?

A: Approximately two and a half years.

Q: Now, did he at any time work with you as an informant helping you determine who the people were who were trafficking in narcotics? [Emphasis added.]

A: Yes, he did.

Q: Did he work with you extensively? By that, a number of times? [Emphasis added.]

A: Yes, he did work a number of times.

Q: Will you describe for us, please, whether he was what one would call an active cooperative worker? [Emphasis added.]

A: He--he introduced me to a marijuana trafficker in the Los Angeles area; he introduced me to him, and I subsequently

made marijuana purchases from this individual.

Q: Were you working in an undercover capacity yourself?

A: Yes, I was.

Q: Did you have occasion to give Mr. Maxted orders for him to carry out in regard to this work he was doing for you?

A: Yes, I did.

Q: Did he cooperate in following those orders? [Emphasis added.]

A: Yes, he done [sic] as he was instructed.

Q: Had you had occasion to contact him here in the San Diego area?

A: No, sir, I don't recall that I ever met Mr. Maxted in the San Diego area."

Id. at 153-54.

On cross-examination, appellee asked Saiz, "And do you know why it was he was working for the F.B.N.?" This question was objected to by appellant as being hearsay, irrelevant and immaterial. Id. at 155. The objection was sustained as calling for "hearsay" statement on the part of this witness. Id. at 162.

When the appellant took the witness stand, his direct testimony, pertinent to his specified error, is as follows:

Q: Mr. Maxted, referring back to 1966, did you during that year up to June the 17th work as an informant with the Federal Bureau of Narcotics?

A: Yes, I did.

Q: Did you have any occasion to work with those people located in the San Diego office?

A: I did.

Q: What were the names of the agent or agents that you worked with?

A: Agents Ray Cantu and Agents Joe Baca."

Id. at 192-93.

On cross-examination, appellee asked the following questions and received the following answers from the appellant:

Q: Mr. Maxted, you worked as an informant for the Federal Bureau of Narcotics. Is that correct?

A: Yes.

Q: In Los Angeles?

A: Yes.

Q: What time did your employment terminate? Your services for the Federal Bureau of Narcotics?

A: At the time of arrest of an individual in the Los Angeles vicinity when the agent that testified earlier this morning one Chris Saiz life was threatened and mine.

Q: Well, when was that, Mr. Maxted?

A: It was in about March.

Q: Of what year?

A: 1966.

Q: You didn't do anything in the Federal Bureau of Narcotics after that, did you?

A: No.

Q: Now, you weren't actually employed by the Federal Bureau of Narcotics, were you?

A: No.

Q: You were acting as an informer?

A: Yes.

Q: Why were you acting as informant for the Federal Brueau of Narcotics?

. . . . . .

Mr. Milchen:

Q: You were arrested for possession of marijuana by the state authorities. Is that correct?

A: That is correct."

Id. at 218-19.

. . . . . .

IV

ARGUMENT

A. THE LOWER COURT DID NOT ERR IN ALLOWING THE GOVERNMENT ON CROSS-EXAMINATION TO ASK THE APPELLANT "WHY WERE YOU ACTING AS INFORMANT FOR THE FEDERAL BUREAU OF NARCOTICS?" WHEN APPELLANT TESTIFIED ON DIRECT THAT HE HAD WORKED AS AN INFORMANT WITH THAT AGENCY.

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1. Standing

The record shows that it was a "hearsay" objection that was sustained on the question asked of Saiz concerning the reason appellant worked as an informant. Id. at 220. The question asked appellant that elicited the evidence which appellant assigns error was objected to without sufficient specificity. Appellant

objected by stating ". . . then the same objection applies here that applies to Mr. Saiz and I so object." Id. The objection that was ultimately applied to Mr. Saiz was a "hearsay" objection. Id. The only grounds that one can assume were stated when appellee asked the question now in issue are a hearsay objection. It is clear that "when the trial judge correctly overrules a specific objection, it cannot be argued on appeal that the evidence . . . was improper for a different reason." United States v. Sing Kee, 250 F.2d 236, 242 (2d Cir. 1957). See also Norwood v. Great American Indemnity, 146 F.2d 797, 800 (3d Cir. 1944). Appellant should not now be allowed to appeal that the evidence was irrelevant and prejudicial when the grounds for such an objection were not stated when the alleged erroneous question was asked.

2. Admission of Appellant's Statements Explaining Direct Testimony Not Unduly Prejudicial

Assuming that appellant may now appeal the trial court's ruling, the evidence elicited by appellee on cross-examination does not fall within the general rule of exclusion, or, in the alternative, does not fall outside an exception to the general rule because its prejudice outweighs its probative value.

Appellee would agree that standing alone evidence of previous wrongful acts is highly prejudicial. However, appellee adopts the position of the court in Banning v. United States,

130 F.2d 330, 338 (6th Cir. 1942), where it found:

> "It frequently happens that on direct examination of a witness as to a conversation, transaction or other matter, counsel will bring out only such parts as are favorable to the party he represents. When this occurs, it is the right of the cross-examiner to put the trial court in possession of the full details respecting the matters within the scope of the direct examination."

In Banning, the defendant on direct examination detailed his past offenses and the times he had been arrested. However, he omitted any statement with reference to his arrest in Iowa. The Government then brought out on cross-examination the fact that he was suspected of bank robbery in Council Bluffs, Iowa, July 2, 1931. Banning was cited for authority on similar issues in United States v. Rayborn, 310 F.2d 339, 340 (6th Cir. 1962) and United States v. D'Antonio, 362 F.2d 151, 154 (7th Cir. 1966).

The facts in Banning are almost identical with the facts now before this Court. The appellant places into evidence that he worked as an informant for the Federal Bureau of Narcotics. Previous to appellant's testimony, he examined, on direct, witness Saiz on exactly this issue. Appellant, in restricting his testimony, gave the jury a distorted picture as to the nature and

extent of his federal duties. The first utility of cross-examination, as envisaged by Wigmore, is the extraction of qualifying circumstances known, but undisclosed, by the witness. Branch v. United States, 171 F.2d 337, 338 n. 3 (D.C. Cir. 1948).

No citation is necessary on the proposition of law that the extent of cross-examination lies in the sound discretion of the trial judge. In absence of abuse, the exercise of that discretion is not reviewable. In this case there was no abuse of discretion. Appellant testified to the fact that he worked as an informant for the federal agency in charge of investigating narcotics. The trial judge was within his discretion in allowing appellee to inquire as to appellant's motive or reasons for such activity. The sole purpose of this question was to place the appellant in his proper setting. Alford v. United States, 282 U.S. 687 (1931).

Any prejudice that may have attached to appellant because of the appellee's cross-examination cannot be declared reversible error. Evidence of appellant's prior arrest, even if prejudicial, must be viewed as harmless error since (1) the questioning by appellee was in the context of cross-examination of material testified to by appellant on direct, (2) the trial judge gave cautionary instructions to the jury requesting them to disregard the reason given by appellant for his employment in the Federal Bureau of Narcotics, R. T. p. 258, and (3) appellee could have

introduced evidence of the prior possession of marijuana in its case-in-chief as a prior similar act showing intent and knowledge.

Appellee's argument as to the first point has been previously made with respect to the Banning discussion.

Second, the general rule is that where evidence is erroneously admitted, the subsequent striking of it from the case, accompanied by a clear and positive instruction to the jury to disregard the evidence, cures the error. A rule which would require a trial court to declare a mistrial and to discharge a jury whenever the court discovered that evidence had been improperly and mistakenly admitted would be absurd. Dolan v. United States, 218 F.2d 454, 460 (8th Cir. 1955). As was said by Mr. Justice Brandeis in Fairmount Glass Works v. Cub Fork Coal, 287 U.S. 474, 485 (1933), "Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct."

Appellant cites Mora v. United States, 190 F.2d 749 (5th Cir. 1951), contending that this evidence created such a strong impression upon the jury so as to render ineffective any direction by the trial court to disregard such evidence. Mora involved the confession of a co-defendant implicating the appellant. The court ruled the inadmissible confession made a deep and lasting

impression in the minds of the jurors. This was not the situation in the present case, and therefore, the instruction of the judge cured any error in admitting the statement of the appellant.

Third, any error that might have occurred must be considered harmless since appellee could have shown in its case-in-chief the prior similar act of possession of marijuana by the appellant as probative of proving intent and knowledge in the present case. In Enriquez v. United States, 314 F.2d 703 (9th Cir. 1963), Judge Barnes, in dictum, held that use or possession of marijuana would be admissible to show the specific intent in a subsequent sale of marijuana charge. Id. at 714.

Appellant argues that DeVore v. United States, 368 F.2d 396 (9th Cir. 1966), requires reversal of the present case because the evidence admitted was overly prejudicial. DeVore, however, must be limited to its facts, and thus cannot apply to the case on appeal. In DeVore, plaintiff placed in its case-in-chief an overabundance of evidence concerning collateral wrongful acts (fifteen separate charge slips introduced into evidence, with the witness being asked to orally describe the articles, and then to list them on the easel; also a written list of the articles was introduced as an exhibit and sent to the jury room; in addition, the prosecutor emphasized the incident in his summation, twice itemizing the merchandise, and repeatedly referred

to appellant's involvement in the unauthorized purchases); whereas in the present case appellee merely asked one qualifying question on cross-examination, R. T. pp. 219, 220, of material that was testified to on direct by the appellant, id. at 192-93, and did not, during argument, comment on the evidence received. Id. at 264-74, 295-304.

3. Answer to Appellee's Question Not Hearsay

The appellant answered the critical question "Why were you acting as informant for the Federal Bureau of Narcotics?" by stating that he had an arrest pending. Id. at 219-20. Appellant argues that this evidence was inadmissible as hearsay. However, appellant's authority for this proposition, United States v. Pennix, 313 F. 2d 524 (4th Cir. 1963) is not in point with respect to the question and answer now before this Court.

Pennix held that a witness may not be asked if he has been accused or arrested for a crime since the question calls for hearsay evidence. Id. at 528. Pennix's holding was with respect to the cross-examination of a witness for the purpose of impeaching his credibility. Therefore, the witness's statements were offered to prove the truth of the matter stated, consequently hearsay.

The present case can be distinguished from Pennix. First, there is no attempt to use a collateral matter to discredit

the witness. The question was relevant to the issue raised by the appellant on direct testimony. Second, the question asked by appellee did not as a matter of necessity call for hearsay testimony. Appellant could have enumerated several reasons for becoming an informer, and appellee would have been bound with his reasons. Third, and most important, the statements were for the purpose of showing the motives of the appellant, and not to prove the truth of the matter stated, i.e., that appellant had as a matter of fact been arrested for possession of marijuana.

Before evidence may be considered hearsay, it must be offered to prove the truth of the matter stated. Cal. Evid. Code Section 1200 (West Supp. 1965). Although there appear to be no cases with facts paralleling the present case, an analogy can be drawn to cross-examination of character witnesses with respect to their testimony concerning defendant's general reputation for truth and veracity. In Mannix v. United States, 140 F.2d 250, 252 (4th Cir. 1944) the court cited 71 A.L.R. 1514 stating:

> "The purpose of the cross-examination of the defendant's character witness with reference to particular acts of the defendant is not to establish such acts as facts, or to prove the truth of the rumors or charges inquired about,

but merely to show the circulation of rumors of such acts, and to test the credibility of the character witness by ascertaining his good faith, information and accuracy." [Emphasis added.]

On this basis, the evidence elicited from the appellant in the present case did not come in as hearsay.

V

CONCLUSION

Appellee respectfully submits that appellant's conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH A. MILCHEN